LIBRARY
PREME COURT, U. S.

FILED
NOV 29 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 431

HERMAN W. BECKER,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

Appeal from the Supreme Court of Appeals of Virginia

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO AFFIRM

ANDRE EVANS
Attorney for the Commonwealth of Virginia
for the City of Virginia Beach

JOSEPH L. LYLE, JR.
Assistant Attorney for the Commonwealth
of Virginia for the City of Virginia Beach

Princess Anne Station
Virginia Beach, Virginia 23456

PRINTED BY TEAGLE & LITTLE, INC., NORFOLK, VA.

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
PRIOR PROCEEDINGS	2
STATEMENT OF FACTS	4
QUESTIONS PRESENTED	5
ARGUMENT	5
CONCLUSION	9

TABLE OF CITATIONS

Cases

Giordenello v. *United States*, 378 U.S. 108 8

Jones v. *United States*, 362 U.S. 270 9

Riggan v. *Virginia*, 384 U.S. 152 7

United States v. *Petrillo*, 332 U.S. 1, 7 6

United States v. *Rumely*, 345 U.S. 41, 47 6

United States v. *Ventresca*, 380 U.S. 102 8

Other Authorities

Code of Virginia (1950) as amended:
Section 18.1-319 2,5

The Constitution of the United States:
The Fourteenth Amendment 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

HERMAN W. BECKER,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

Appeal from the Supreme Court of Appeals of Virginia

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO AFFIRM

PRELIMINARY STATEMENT

By letter of the Honorable John F. Davis, Clerk of the Supreme Court of the United States, dated November 1, 1968, the Attorney General of Virginia was requested to file a response to the appeal taken from an order of the Supreme Court of Appeals of Virginia in the instant case. By letter of November 6, 1968, the Attorney General of Virginia requested that the Commonwealth's Attorney for the City of Virginia Beach, Virginia file a response in this matter. It is in accordance

with these requests that the within response is filed. The appellee, believing that the matters set forth herein will demonstrate the lack of substance in the question sought to be presented by this appeal, files this statement in opposition to the appellant's jurisdictional statement and includes her motion to affirm the judgment of the court below upon the ground that the questions upon which the decision of this cause depends are so unsubstantial as to obviate further argument.

PRIOR PROCEEDINGS

On November 15, 1967, the appellant was convicted in the Circuit Court for the City of Virginia Beach, Virginia for the violation of a misdemeanor statute proscribing gambling or the possession of gambling paraphernalia for purposes enumerated therein. The statute in question is Code of Virginia (1950) §18.1-319, which reads as follows:

> "§18.1-319. Betting on games, races, etc.—No person shall:
>
> (1) Occupy any room, shed, tenement or building, or any part thereof, or any place upon any grounds, with books, apparatus or paraphernalia for the purpose of recording or registering bets or wagers or of selling or making books, pools or mutuals upon the result of any game, athletic contest or any trial of speed or power of endurance of animals or beasts,
>
> (2) Being the owner or lessee or occupant of any room, tent, tenement, shed, booth or building or part thereof, knowingly permit the same to be used or occupied for any such purpose, or therein

keep, exhibit or employ any device or apparatus for the purpose of recording or registering such bets or wagers or the selling or making of such books, pools or mutuals,

(3) Become the custodian or depository for gain, hire or regard of any money, property or thing of value bet or wagered or to be wagered or bet contrary to the provisions of this section,

(4) Receive, register, record, forward or purport or pretend to forward to or for any game, athletic contest or any race course any money, thing or consideration of value offered for the purpose of being bet or wagered upon any game or athletic contest or the speed or endurance of any animal or beast,

(5) Occupy any place or building or part thereof with books, papers, apparatus or paraphernalia for the purpose of receiving or pretending to receive, recording, registering or forwarding, or pretending or attempting to forward, in any manner whatever, any money, thing or consideration of value bet or to be bet contrary to the provisions of this section, or

(6) Aid, assist or abet at any race track or place in any manner in any of the acts forbidden by this section.

Any person violating the provisions of this section shall be fined not less than two hundred nor more than one thousand dollars and be imprisoned not less than thirty days nor more than ninety days. But nothing in this section shall be construed to

prevent agricultural associations and riding and driving clubs or associations from offering a purse or premium at such trials of speed of animals or beasts as may be held by them."

In accordance with the jury's verdict, the appellant was fined One Thousand ($1,000.00) Dollars and sentenced to thirty days in jail.

Within the time provided by state statute, the appellant applied to the Supreme Court of Appeals of Virginia for a writ of error reviewing the trial court's judgment, and, on April 24, 1968, the Supreme Court of Appeals rejected this petition. The case is now before this Court upon an appeal filed by the appellant on August 22, 1968.

STATEMENT OF FACTS

The statement of facts in appellant's brief is substantially correct. The Commonwealth, however, would also point out that the officers not only testified to the items seized, but also testified as experts as to what these items were commonly used for; namely, the odds on baseball games and what the odds were, how they were determined, and that they were commonly used for the purpose of recording bets. In addition, the officers testified that during a period of forty-five (45) minutes, the telephones rang approximately forty-one (41) times, and that the callers would ask for "Beck" (referring to the defendant) and request to place bets. (Tr. p. 108). Furthermore, Detective C. H. Harris testified that newspapers were seized which contained numerous amounts of racing information pertaining to horses (Tr. p 137) and Detective W. L. Grant testified that the newspaper headlines read, "Bookies Favor Becomes Better for

Braves" and "Betting Pool Convictions Overturned". (Tr. p. 145). There was also testimony that the defendant freely stated that he had a special source from which he got his odds, and that the defendant had also physically pointed out to Officer Weast how he listed these odds to the right of each team and actually wrote the odds down in the presence of Officer Weast. (Tr. p. 170)

QUESTIONS PRESENTED

1. Whether Section 18.1-319, Code of Virginia, as amended, 1950, the statute under which appellant was charged, is so vague, indefinite and ambiguous as to be repugnant to and in violation of the appellant's rights as guaranteed under the Fourteenth Amendment, Section One, of the United States Constitution.

2. Whether under the circumstances of this case, the statements made by appellant to police officers were voluntary.

3. Whether the information possessed by Sgt. C. R. Weast constituted probable cause for the issuance of the search warrant in the execution of which the search and seizure were conducted and made in this case.

ARGUMENT

A. §18.1-319 of the Code of Virginia (1950), as amended, is not so vague, indefinite and ambiguous as to be repugnant to and in violation of the appelant's rights as guaranteed under the Fourteenth Amendment, Section One, of the United States Constitution.

The appellant cites no applicable authority to the effect that the state statute under attack, or any similar statute, has been held to be vague, indefinite or ambigu-

ous. A reading of this statute discloses that its obvious purpose is to suppress unlawful gambling, and to allow the seizure of any equipment contemplated to be used therefor. It can hardly be seriously contended that the statute in question fails to describe the proscribed articles or that, under the evidence in this case, the articles in question were not contemplated or intended to be used for gambling purposes. The gist of the statute in question does not relate to the naked possession of the books and apparatus, but rather the purpose for which they are possessed; the evidence in the case leaves no question as to the purpose for which the defendant kept these items on hand.

This Court has often held that statutes are not automatically invalidated as vague simply because it is difficult to determine whether certain marginal offenses fall within their purview. *United States* v. *Petrillo,* 332 U.S. 1, 7, 91 L.ed. 1877, 1882, 67 S.Ct. 1538 (1947). To the contrary, the Court has quite properly sought an interpretation consistent with the validity of the legislation. *United States* v. *Rumely,* 345 U.S. 41, 47, 97 L.ed. 770, 776, 73 S.Ct. 543 (1953).

The appellant has failed to point out in what particular, if any, the Virginia statute in question is vague; a reading of the statute discloses that the proscribed conduct is clearly delineated.

B. The statements made by appellant to police officers were voluntary under the circumstances, and hence were admissible as evidence.

The appellant, on page nine of his petition, urges that the incriminatory statements made by him were, as a matter of law, inadmissible for the reason that he was

not advised of his rights prior to making such statements. This conclusion is, of course, predicated upon the theory that these statements were not voluntary.

The record contains no evidence, nor the petition any suggestion, that circumstances existed which deprived the appellant of his free will in this matter. There is no evidence that he was lacking in education or intelligence, that he was coerced or tricked by the police officers, or that in any way he was subjected to improper or coercive influences. In the absence of such evidence, the position of the appellant must rise or fall upon the premise that, *as a matter of law,* the accused in a misdemeanor case must be advised of his rights prior to making a statement to law enforcement authorities. The writer is not aware of any applicable authorities so holding, and it is significant that no such authorities are cited in the appellant's petition.

C. The police officer in question possessed sufficient information to constitute probable cause for issuance of the search warrant.

It is finally urged by the appellant that, since the search warrant in question was void for lack of probable cause for the issuance thereof, the evidence and exhibits obtained thereunder were inadmissible. In support of his position, he cites *Riggan* v. *Virginia,* 384 U.S. 152, 86 S.Ct. 1378, 16 L.ed. 431 (1966). In the *Riggan* case the affidavit for the search warrant asserted merely: "personal observation of the premises, . . ." and "information from sources believed by the police to be reliable . . ." This Court felt that these bare allegations in the affidavit left the determination of the reliability of the information up to the officer, rather than to the magistrate, in

that it asserted no facts upon which the conclusion of reliability was predicated. Like *Giordenello* v. *United States,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.ed. 2d 723 (1964), the *Riggan* affidavit failed to "indicate any sources for the complainant's belief . . . ."

By contrast, the affidavit in the case at bar recites "information from known gambler, and observations by Sgt. Weast and said informant has associated with and gambled with the above subject [the appellant]."

These allegations, particularly when considered in the light of the overwhelming weight of corroborative testimony in the record, are certainly sufficient to constitute "probable cause," which, as this Court pointed out in *United States* v. *Ventresca,* 380 U.S. 102, 85 S.Ct. 741, 13 L.ed.2d 684 (1965), is a practical, rather than an abstract concept. The language of this tribunal in that case is particularly applicable here. In reviewing the line of decisions construing the Fourth Amendment as it relates to search warrants and the affidavits upon which they are based, this Court stated at 13 L.ed. 2d 689:

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging

> or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting . . . Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. *Jones* v. *United States,* supra 362 U.S. at 270, 4 L.ed.2d at 707, 78 ALR2d 233."

CONCLUSION

In conclusion, it is respectfully submitted that the questions upon which the decision of this cause depends are so unsubstantial as to obviate further argument.

Respectfully submitted,

ANDRE EVANS
Attorney for the Commonwealth of Virginia
for the City of Virginia Beach

JOSEPH L. LYLE, JR.
Assistant Attorney for the Commonwealth of
Virginia for the City of Virginia Beach

Princess Anne Station
Virginia Beach, Virginia 23456

CERTIFICATE

I, Joseph L. Lyle, Jr., Assistant Attorney for the Commonwealth of Virginia for the City of Virginia Beach, a member of the Bar of the Supreme Court of the United States and one of Counsel for appellee in the above captioned matter, hereby certify that copies of this statement of appellee opposing jurisdiction and motion to affirm have been served upon each counsel of record for the parties herein by depositing the same in the United States Post Office, with first class postage prepaid, this 27th day of November, 1968, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: William E. Culverhouse and Garland M. Layton, P. O. Box 5211, Bayside Station, Virginia Beach, Virginia, counsel for appellant.

JOSEPH L. LYLE, JR.
Assistant Attorney for the Commonwealth
for the City of Virginia Beach